(6)

No. 93-1911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CINDA SANDIN, Unit Team Manager,
Halawa Correctional Facility, Hawaii,
Petitioner,

vs.

DEMONT R. D. CONNER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When an inmate, already sentenced to prison, is assigned to disciplinary segregation, with no direct impact on the duration of his prison sentence, is that assignment a deprivation of liberty within the meaning of the Due Process Clause?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Adequate punishment of the massive amounts of crime we now have in the United States requires a massive expenditure of public funds. Although the total rate of crime has declined slightly since the get-tough attitude took hold, U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Statistics 1993, p. 352 (1994) (rate per 100,000 pop. peaked in

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1. Both parties have given written consent to the filing of this brief.

1980), it will be many years before the level is reduced to where it was in the 1950's. In the meantime, any incremental cost per prisoner will be multiplied by a massive number of prisoners.

One of those costs is prisoner litigation. Prisoner civil rights cases filed in federal courts by state prisoners multiplied fivefold in 16 years, *id.*, at 550, a much faster increase than the growth of the prison population. Cf. *id.*, at 600. As one federal judge put it, "Prisoner suits seeking to enforce constitutional rights have become a gigantic farce." Doumar, Prisoners' Civil Rights Suits: A Pompous Delusion, 11 George Mason L. Rev. 1, 1 (1988).

By using up scarce resources, excessive prisoner litigation detracts from the ability of the state to properly punish crime and protect the law-abiding public, and is therefore contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The federal magistrate in the present case described plaintiff DeMont R. D. Conner thusly:

> "Plaintiff has been convicted of multiple violent crimes including attempted murder, kidnapping, burglary, robbery and rape. He has been sentenced to life imprisonment and his minimum term has been set at 30 years, which includes a 5-year consecutive sentence for escape.
>
> "While incarcerated, he has committed numerous misconducts involving assaults or attempted assaults on other inmates and staff, as well as misconducts involving threats to, interference with, harassment and abuse of staff.
>
> "Plaintiff has twice attempted escape. The first time resulted in his conviction for attempted escape in the second degree on April 4, 1985. The second attempt resulted in a misconduct charge on September 4, 1984. In short, given the length of his sentence and his manifest predilection for violence, Plaintiff appears to present the stereo typical criminal over which the State has little control or leverage." Report and Recommendation Granting Defendant's Motion for Summary Judgment 4.

The present litigation involved numerous claims, but Conner only prevailed on two, *Conner* v. *Sakai*, 15 F. 3d 1463, 1471 (CA9 1993), one of which became moot. Pet. for Cert. 9, fn. 1.

Conner was accused of misconduct during a routine search for contraband. *Id.*, at 6-8. He was initially assigned to 4 hours in disciplinary segregation on two minor charges and 30 days on the most serious charges. The latter, however, were reversed on review within the prison system. App. to Pet. for Cert. A66-A67.

Conner filed a civil rights suit claiming, among other things, that committee chairman Cinda Sandin did not permit him to call witnesses. The District Court granted defendant's motion for summary judgment on this claim, but the Ninth Circuit Court of Appeals reversed as to defendant Sandin. 15 F. 3d, at 1467-1468.

The discipline imposed in this case causes no loss of good time credit (which Hawaii does not have), nor does it necessarily have any effect on parole. Pet. for Cert. 6. This Court granted certiorari limited to the question of whether, under such circumstances, the inmate has a " 'liberty interest' in avoiding disciplinary segregation." Pet. for Cert. i; Order Granting Petition for Writ of Certiorari, Oct. 7, 1994.

SUMMARY OF ARGUMENT

Judicial interference in prison discipline affects more than the public purse. An undisciplined prison is a chamber of horrors. Protection of the weaker inmates from cruelties far beyond the limits of the Eighth Amendment requires swift and sure discipline.

The line of cases dealing with "state-created liberty interests" is fundamentally flawed. A method of analysis developed for property and appropriate to property has been applied to liberty without careful consideration of the difference between them.

Where the plaintiff has previously been sentenced to incarceration *with* due process of law, the only question should be whether the challenged action constitutes such a qualitative change in the *type* of custody, and not merely a greater *degree*

of restriction within previously authorized custody, as to constitute *a new* deprivation of liberty. If not, the Due Process Clause is inapplicable, and the state should be free to construct its own procedures, without fear that too much structure will result in burdensome judicial control.

Adoption of this standard would not change the result of the bulk of prisoner due process cases.

ARGUMENT

I. The persons who will suffer the most from a lack of prison discipline are the weaker prisoners.

Prison discipline cases come to court in the form of the individual prisoner on one side and the institution and its officers on the other. Unseen and unheard in this confrontation are other people who have a very real interest in its outcome: other prisoners for whom a breakdown in discipline can mean grievous injury or even death.

Too often, being imprisoned "is to experience a Hobbesian world; one encounters 'a barely controlled jungle where the aggressive and the strong will exploit the weak and the weak are dreadfully aware of it.' " Robertson, Surviving Incarceration: Constitutional Protection from Inmate Violence, 35 Drake L. Rev. 101, 102 (1985). It is difficult to measure the precise level of prison violence because of "the convict norm prohibiting 'squealing' on fellow prisoners." *Id.*, at 104. The estimates that have been made, however, are unsettling. One estimate places the homicide rate in prisons at eight times the national level. See V. Fox, Correctional Institutions 108 (1983). Assault rates are even higher. See Robertson, *supra*, 35 Drake L. Rev., at 105. Rape, "the grayest area of the statistical map of prison violence," is the threat most exacerbated by prison life. Even the most conservative estimates report that rape within prison is as prevalent as heterosexual rape outside of prison, while one study found that "73.9% of the inmates interviewed at the Tennessee state prison were aware of at least one rape per month." See *ibid*. It is little wonder that the climate of fear in prisons can be overwhelming. As one inmate's account illustrates:

> "I ate with my back to the wall. I showered with my back to the wall—and never dropped my soap, or just left it if I did. When I went to the movies, I made sure a friend was behind me, and noticed everyone in the vicinity. If I went to the yard, which was seldom, I kept the gun tower in my sight. At night, all my cellmate had to do was so much as move a muscle—or think about it—and I was wide awake." *Id.*, at 105-106 (quoting G. Myron, Maximum Security Letters from Prison 45 (1972)).

Discipline is essential to keep prison life from turning into a true state of nature. "Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson* v. *Palmer*, 468 U. S. 517, 526 (1984). The inmates "have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others." *Ibid*. The social contract that binds us in normal society is not enough; tight discipline must be the order of the day in prisons. "A society in which men recognize no check upon their freedom soon becomes a society where freedom is only in the possession of a savage few; as we have learned to our sorrow." L. Hand, The Spirit of Liberty 190 (1st ed. 1952). Justice Hand's admonition is even more relevant to the closed, anti-social community of prisons.

"The only way in which it [prison violence] can be controlled is by developing an authoritarian society managed by an authoritative administration. This does not mean that the administration has to meet violence with violence, rather *the prison must have sufficient controls so that violence is contained.*" Fox, *supra*, at 96-97 (emphasis added). The Due Process Clause must not be used to straitjacket efforts to protect inmates from each other. Prison administrators need to be able to act flexibly, quickly, and decisively in order to limit prison violence. Cf. Farmer, A Case Study in Regaining Control of a Violent State Prison, 52 Fed. Prob. 41, 44-45 (March 1988) (possible riot averted in Walpole State Prison, Massachusetts, when ten suspected ringleaders were rounded up at 3 a.m. and bussed to a federal prison in Wisconsin).

The cost of applying the Due Process Clause to prison discipline does not lie solely, or even primarily, in the mandated

procedures themselves. "The real burden accrues not from the task itself, . . . but from the fact that its performance is judicially commanded and judicially enforced." Simon, Liberty and Property in the Supreme Court: A Defense of *Roth* and *Perry*, 71 Cal. L. Rev. 146, 159 (1983). A judicially created requirement means that courts must review whether the procedures are adequate and whether they have been complied with in a particular case. Small wonder, then, that the volume of prisoner litigation has been rising much faster than the prison population. See *ante*, at 1. As much of a burden as this places on courts, it places a greater one on the prisons.

If the cost of imposing punishment is excessive, it stands to reason it will be imposed less often, resulting in a decline in discipline. A court that excessively interferes with prison discipline may be sentencing the weaker prisoners to a fate far worse than anything we would tolerate under the Eighth Amendment.

II. The Due Process Clause should only apply to changes in custody qualitatively different from that authorized by the original sentence.

A. Rights, Privileges, and Screens.

As recently as the 1950's, a key question in due process cases was whether the case involved a "right" as opposed to a mere "privilege" or "matter of grace." See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 544 (1950); *Jay* v. *Boyd*, 351 U. S. 345, 354-355 (1956). No constitutional procedural protections applied to the latter. Whatever process the legislative authority provided was *per se* all that was due. *Knauff*, 338 U. S., at 544.

After a long illness, the right-privilege distinction was pronounced dead in 1971. *Graham* v. *Richardson*, 403 U. S. 365, 374 (1971). In the years since, it has become fashionable to refer scornfully to the "thoroughly discredited distinction between rights and privileges . . . ." See *Arnett* v. *Kennedy*, 416 U. S. 134, 211 (1974) (Marshall, J., dissenting). One commentator has gone so far as to call two well-known opinions of Justice Holmes "infamous." Smolla, The Reemergence of the

Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much, 35 Stan. L. Rev. 69, 83 (1982).

Despite all the insults heaped upon it, the right-privilege distinction did perform an essential function. While doctrines can be abandoned or even "discredited," essential functions must go on, precisely because they are essential.

The constitutional provision in question states, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U. S. Const., Amdt. 14, § 1. When any action of government is challenged under this clause, two questions necessarily arise. Has the state deprived the person of life, liberty, or property, and, if so, what process was due?

If the minimum answer to the second question is "some kind of hearing," see *Wolff* v. *McDonnell*, 418 U. S. 539, 557-558 (1974), then the first question *must* set some kind of floor. "Good sense would suggest that there must be some floor below which no hearing of any sort is required." Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1275 (1975). Government would grind to a halt if *every* decision adverse to anyone had to be preceded by a hearing and followed by a lawsuit. If the Justices of this Court had to hold a hearing for every applicant not hired as a law clerk, there would be no time to write opinions. In times gone by, such claims would have been screened out by the principle that government employment is a privilege and not a right. *Bailey* v. *Richardson*, 182 F. 2d 46, 58 (CA DC 1950), aff'd by an equally divided court, 341 U. S. 918 (1951). This screening function was essential, and it had to be replaced.

B. Explosion and Containment.

In the early 1970's, we "witnessed a due process explosion in which the Court has carried the hearing requirement from one new area of government action to another . . . ." Friendly, *supra*, 123 U. Pa. L. Rev., at 1268. One British jurist, after an exchange program, "said that the main value of the enterprise from the English standpoint had been to observe the horrible American examples of over-judicialization of administrative procedures and undue extension of judicial review, and to learn not to do likewise." *Id.*, at 1269.

Goldberg v. *Kelly*, 397 U. S. 254 (1970) spearheaded the extension of judicial review. The cases on which *Goldberg* principally relied involved either deprivations of property in the traditional, tangible sense, *id.*, at 267 (citing *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969)), or interference with rights long recognized as fundamental. *Id.*, at 262 (citing *Shapiro* v. *Thompson*, 394 U. S. 618 (1969) (interstate travel); *Sherbert* v. *Verner*, 374 U. S. 398 (1963) (free exercise of religion)). The *Goldberg* case involved neither, but dealt with the procedures required for termination of welfare benefits. 397 U. S., at 255-257.

Relying on the writings of Charles Reich, *Goldberg* likened welfare benefits to property. *Id.*, at 262, n. 8. This is not property as it was understood at the time the Fourteenth Amendment was adopted. It is "new property," see *ibid.*, which has been created by legislative action. Yet *Goldberg* holds, in effect, that the legislative authority which *is* competent to create previously unknown property rights is *not* competent to decide what process is due in adjudicating whether a particular person is or is not entitled to the new property. "New property" is thus a constitutional Frankenstein's monster, beyond the control of its creator. There was a brief rebellion against this notion of divided competence, *Arnett* v. *Kennedy*, 416 U. S. 134, 152 (1974) (plurality opinion), but it has been quelled. See *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532, 541 (1985).

If the legislature is not competent to decide what process is due, then where do we look? One could look to the common law, which requires a judicially-issued warrant for most seizures of property. See *Carroll* v. *United States*, 267 U. S. 132, 156 (1925). The administrative state would collapse under such a burden. *Goldberg* thus rejected a judicial hearing and proceeded to promulgate its own standards for the necessary incidents of the required administrative hearing. 397 U. S., at 266-271.

As an abstract statement, it is hard to disagree with *Goldberg*'s assertion that the extent of process required depends upon a weighing of interests. *Id.*, at 263. The critical question is *in whose opinion* does the need for a particular procedure outweigh the burden of providing it? With concrete guidance in neither the Constitution nor the common law, the *Goldberg*

Court effectively holds that its opinion as to what is fair trumps the opinions of the elected branches. The separation of powers implication of this holding did not go unnoticed. *Id.*, at 273-274 (Black, J., dissenting).

Two years after *Goldberg*, the Court recognized the need for a limiting principle in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972). Even while emphatically rejecting the "wooden distinction between 'rights' and 'privileges,' " *id.*, at 571, *Roth* sought a replacement for the essential function served by that distinction:

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." *Id.*, at 569-570 (footnote omitted).

So instead of "rights" and "privileges," we have "protected interests" and other things which are either not interests or not protected. "Property" is not limited to "real estate, chattels, or money," *id.*, at 571-572,[2] and deprivations of liberty are not limited to penal incarceration. *Id.*, at 572.

The plaintiff in the *Roth* case was a college professor hired for a single year and not hired the following year. He claimed a due process right to a hearing before the nonrenewal decision. *Id.*, at 566, 569. In deciding whether he had a protected interest, the Court examined liberty first and property second, but the reverse order is more illuminating for the present discussion.

"Property interests, of course, are not created by the Constitution." *Id.*, at 577. Nor did people in a state of nature have any "right" to property; they had whatever they could obtain and hold by force. Property interests must be created by law, usually state law. See The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961) (J. Madison).

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2. Nor was it so limited in the common law, which recognized a bewildering array of property interests, including public offices and franchises. See 2 W. Blackstone, Commentaries 36-37 (1st ed. 1766).

The same substantive law that creates the property interest is necessarily competent to establish its duration. If that law establishes a termination date and creates no obligation to renew that contract, then there simply is no *property* interest beyond that date. 408 U. S., at 578. The fact that the university officials did not need any cause to not renew, and therefore had complete discretion, was dispositive.

This approach is fully consistent with the common understanding of what it means to have a property interest, "an interest one can insist upon, rather than one which turns upon the good will of another." Simon, Liberty and Property in the Supreme Court: A Defense of *Roth* and *Perry*, 71 Cal. L. Rev. 146, 171 (1983).[3] The difference between a promise which is adequate to form a contract (if other requirements are met), and hence to create a property right in the promisee, and a mere illusory promise, which creates no enforceable rights, is that in the latter the promisor can simply change his mind. 1 S. Williston, Contracts § 1:2, p. 11 (4th ed. 1990).

Turning back to the liberty analysis in *Roth*, we see that the terms of Roth's appointment, so central to the property analysis, is conspicuous by its absence. Part II of the opinion contains not a word about whether the renewal decision was mandatory or discretionary. Instead, the holding that there was no deprivation of liberty is premised on the fact that Roth's freedom of action is not hindered by the government. "[H]e simply is not rehired in one job but remains as free as before to seek another." 408 U. S., at 575.

This point is reinforced by another "liberty" case decided the same day, *Morrissey* v. *Brewer*, 408 U. S. 471 (1972). The question was whether an opportunity to be heard was required before revoking parole. *Id.*, at 472. The Court reiterated the rejection of the right-privilege distinction, and also rejected the idea that the weight, rather than the nature, of the interest was determinative. *Id.*, at 481.

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3. Simon is in the academic minority, with most of the commentary on *Roth* being negative. See *id.*, at 178-190 (responding to critics). The fact that the academic majority prefers the result favored by the political left occurs with such regularity that it no longer has any significance.

Significantly for the present case, *Morrissey* does not undertake a detailed examination of the parole statute of the jurisdiction in question, although the Court discusses parole in general. See *id.*, at 477-480. The holding that revocation of parole constitutes a deprivation of liberty, requiring due process, turns not on the criteria for revocation or the discretionary nature of the decision, but instead on the enormous difference in freedom between parolees and incarcerated prisoners. *Id.*, at 481-482. While both are in custody, the restraints differ in kind and not merely in degree.

This difference in approach, *amicus* submits, was entirely appropriate. Liberty and property are different kinds of interests, and different considerations determine whether one is deprived of liberty, as opposed to property. The very essence of property is the right to use the thing owned to the exclusion of others. *Dolan* v. *City of Tigard*, 129 L. Ed. 2d 304, 316, 114 S. Ct. 2309, 2316 (1994). A person claiming a property interest must therefore be able to point to some affirmative source of that exclusive right, and that source must be one recognized in law.

Liberty is different. Liberty is freedom from government restraint. People have complete liberty in a state of nature, but to live in a civilized society we surrender a portion of our natural liberty, which is limited by duly enacted laws. 1 W. Blackstone, Commentaries 121 (1st ed. 1765). While property interests can only be *created* by law, liberty can only be *limited* by law. *Meachum* v. *Fano*, 427 U. S. 215, 230 (1976) (Stevens, J., dissenting). There is simply no such thing as a state-created liberty interest. When a person's natural liberty is restricted, that restriction is imposed either with or without due process of law. However faulty its final conclusion, the *Meachum* dissent was correct on the basic approach.

The state-created interest approach seems to have slithered sideways from property into liberty without a careful consideration of the difference. In *Wolff* v. *McDonnell*, 418 U. S. 539, 557 (1974), the Court characterized "good time" credits (which shorten a prison sentence) as a state-created right and then declared that the "analysis as to liberty parallels the accepted due process analysis as to property." Because these credits could be lost only for serious misconduct, procedural due process applied. *Id.*, at 558. A footnote of pure dictum rendered an advisory

opinion that the same analysis would apply to disciplinary confinement. *Id.*, at 571, n. 19. On the other hand, the state law in *Meachum*, *supra*, vested the state officials with complete discretion to assign prisoners to various prisons, and hence there was no state-created interest to avoid such a transfer. 427 U. S., at 226-227.

C. Prisoner Cases Since Wolff.

In the years since *Wolff*, the Court has continued to adhere to the approach of looking at the statute to see how much discretion corrections officials have, but the course has not been smooth. In *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 11-12 (1979), the state standards for granting parole were vague and subjective, and they called for prediction of future behavior, rather than determination of past facts. Without saying why, the majority accepted "respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection," *id.*, at 12, but held that procedures used were adequate. *Id.*, at 16.

Conversely, *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458 (1981), the board had "unfettered discretion" to commute sentences, with "no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied to the Board." *Id.*, at 466. Therefore, the state was not required to explain its decisions to federal courts. *Id.*, at 467.

The paradoxical message to the states of these two cases comes through loud and clear. To avoid being haled into federal court, make your prison officials absolute autocrats like the warden in "Cool Hand Luke." Create any standards, any structure, any guidance, and you will spend scarce time and resources in litigation and surrender ultimate control of your procedures to a life-tenured, unaccountable judiciary.

Hewitt v. *Helms*, 459 U. S. 460 (1983), which comes the closest to the present case, recognizes this problem. "It would be ironic to hold that when a State embarks upon such desirable experimentation [with procedural guidelines for discipline] it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions

entirely avoid the strictures of the Due Process Clause." *Id.*, at 471. Yet *Hewitt* then proceeds to parse the language of the statute, and based on the choice of words finds "that the State has created a protected liberty interest." *Id.*, at 472.

The triumph of form over substance reached its peak in *Board of Pardons* v. *Allen*, 482 U. S. 369 (1987). Although using the word "shall," the statute based parole on whether the board believed "the prisoner can be released without detriment to the prisoner or to the community" and whether "he is able and willing to fulfill the obligations of a law-abiding citizen." *Id.*, at 376-377. While this may be fact-finding in form, it is unfettered discretion in reality. See *id.*, at 384 (O'Connor, J., dissenting). Even while giving the wrong answer, the *Allen* majority notes its doubts about whether it is asking the right question. *Id.*, at 373, n. 3.

The Court then leapt from pillar to post in *Kentucky Dept. of Corrections* v. *Thompson*, 490 U. S. 454 (1989). That case involved the question of whether the prison inmates had a "liberty interest" in receiving certain visitors. *Id.*, at 455. *Thompson* said that no liberty interest was created because "the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against the prison officials." *Id.*, at 465. That would be a reasonable standard if the Court were to stay with the state-created liberty interest approach, but it does not come close to explaining the previous decision in *Board of Pardons* v. *Allen*, *supra*. How could one enforce in a court of law a regulation requiring release upon the intangible standards in the *Allen* case? The only way a court could "enforce" that regulation would be to substitute its own opinion as to the prisoner's ability and willingness to be a law-abiding citizen.

Allen and *Thompson* do not differ in the enforceability of the regulations in any real-world sense. The only difference is in the form of words the respective drafters chose to use. For one of the most important provisions of our Constitution to apply or not apply depending on the hollow form of words without substance indicates that something is gravely amiss.

D. A Unitary Approach.

What is amiss, *amicus* submits, is the whole notion of state-created liberty interests. As noted earlier, *ante*, at 11, law can only limit liberty, not create it, for without law there is total liberty. The correct question in prisoner cases is whether the prisoner has suffered a *new* deprivation of liberty of constitutional magnitude, beyond the deprivation suffered *with* due process of law upon the original conviction and sentence, as modified by subsequent proceedings. This is substantially the same as the question traditionally phrased as whether the interest is "guaranteed directly by the Due Process Clause." *Thompson*, 490 U. S., at 460. State law is relevant only as to the extent of the original deprivation and as to whether the sentence has been modified, such as by an executed commutation or parole.

As the *Wolff* Court noted long ago, a sentence to prison does not terminate all constitutional rights. *Wolff* v. *McDonnell*, *supra*, 418 U. S., at 555-556. Indeed, the Cruel and Unusual Punishments Clause was inserted in the Bill of Rights specifically for the benefit of convicted persons. Prisoners also retain a variety of other rights which are not incompatible with their status or with prison administration. See, *e.g.*, *Turner* v. *Safley*, 482 U. S. 78, 97-98 (1987) (marriage).

However, the deprivation of "liberty," in its core meaning of the right to move without restraint, 1 Blackstone, *supra*, at 130, is the essence of the punishment imposed by a sentence to prison. The formerly free person has, by choosing to commit a felony, forfeited his freedom and been placed in the custody of state officials. That custody includes the power to place the inmate in a particular cell in a particular prison, as well as to make numerous other decisions for him that free adults make for themselves.

Returning to the original approach of *Morrissey*, *amicus* believes that the correct approach is to look at the change in custody caused by the challenged action and ask whether the inmate is being subjected to a different *kind* of custody as opposed to a greater *degree* of confinement within a particular kind. See *Morrissey*, *supra*, 408 U. S., at 481-482. Is the new custody *qualitatively* different? See *Vitek* v. *Jones*, 445 U. S. 480, 493 (1980).

In the case of revocation of good-time credits in *Wolff*, the question would be whether the inmate continues in a different kind of custody from the kind he would have been in as a matter of course, had the authorities taken no action. Under a good time credit system, a sentence to a particular term is, with good behavior, actually a sentence to a shorter term. Legislative reduction of credits is an *ex post facto* increase in punishment, *Weaver* v. *Graham*, 450 U. S. 24, 35-36 (1981), and individual revocation is a new deprivation of liberty.

The fact that a state chooses to place some structure on its administrators' decisions should not obligate the state to litigate those decisions in federal court. Such a salutary development ought to be encouraged, not punished. Keeping this structure within the discretion of prison officials will encourage the swift and sure discipline needed to deal with the overwhelming horror of inmate violence. See *ante*, at 4-6.

The approach we propose would only change the result in one of the entire series of prisoner due process cases. The prisoners would still prevail in *Morrissey* and *Wolff*, because these cases involve people who were outside the prison, or would have been outside in due course. Also in *Vitek* v. *Jones*, *supra*, the change from state prison to a mental hospital was a change to a different kind of custody, 445 U. S., at 493, which is a new deprivation requiring due process.

All but one of the cases that found a state-created liberty interest without a change in the type of custody found that the minimal process provided was all that was due. *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, 442 U. S., at 16; *Hewitt* v. *Helms*, *supra*, 459 U. S., at 477. The state would also have prevailed if these cases had simply said that no process was required by federal law. Naturally, the cases which found no state-created interest would also be decided the same. See *Meachum* v. *Fano*, *supra*, 427 U. S., at 229; *Montanye* v. *Haymes*, 427 U. S. 236, 243 (1976); *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458, 467 (1981); *Jago* v. *Van Curen*, 454 U. S. 14, 21 (1981) (*per curiam*); *Olim* v. *Wakinekona*, 461 U. S. 238, 250-251 (1983); *Kentucky Dept. of Corrections* v. *Thompson*, 490 U. S. 454, 465 (1989).

The one case that would have had a different result under the standard we propose is *Board of Pardons* v. *Allen*, *supra*. That case made an unwarranted judicial intrusion into a core executive function, and should be overruled.

E. Stare Decisis.

The principal objection to scrapping the notion of state-created liberty interests would be the doctrine of *stare decisis* and the number of cases that have been decided under that rubric. But a closer look at the values underlying the doctrine diminishes this concern.

The main force behind *stare decisis* is the settled expectations of people who arrange their affairs in reliance on court decisions. Reliance is rarely a factor in procedural cases. See *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991); *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 140 (1941). Given that this Court has almost always found state-provided procedure adequate for state-created liberty interests, abandonment of that doctrine will change few, if any, procedures and upset few, if any, expectations.

Stability itself has value, *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986), but stability implies a consistent line of authority. When one case requires enforceable criteria for a state-created interest, *Thompson*, 490 U. S., at 465, and another case finds such an interest with the vaguest, least enforceable criteria imaginable, *Allen*, 482 U. S., at 376-377, any call for stability rings hollow. The statement of *Nichols* v. *United States*, 128 L. Ed. 2d 745, 753-754, 114 S. Ct. 1921, 1926-1927 (1994) about a single, splintered precedent applies as well to an inconsistent line of precedent. Where the line provides no coherent guidance for lower courts, the purpose of *stare decisis* is not served, and that is reason enough to reconsider the issue.

For the present case, the question is whether temporary assignment to more restrictive confinement is a change in kind of custody so as to amount to a *new* deprivation of liberty, which requires due process. We can put to one side detentions so severe they amount to cruel and unusual punishment. They can be attacked substantively regardless of how much process is provided, see, *e.g.*, *Spain* v. *Procunier*, 600 F. 2d 189, 199

(CA9 1979), although some inmates are so impossible that otherwise cruel measures become necessary. See *LeMaire* v. *Maass*, 12 F. 3d 1444, 1458 (CA9 1993).

In this case, as in most prison discipline cases, we are dealing with a temporary removal to a more restrictive confinement for a period far less than the length of the sentence. This does not approach the magnitude of parole revocation or commitment to a mental hospital. It is more like assignment to a different prison. Cf. *Hewitt*, *supra*, 459 U. S., at 468; *Meachum*, *supra*, 427 U. S., at 225. It is not a new deprivation, but within the deprivation of liberty made *with* due process of law when the inmate was sentenced.

Because there has been no new deprivation of liberty of constitutional magnitude, no process is constitutionally required. The state can provide the process it believes fairness and regularity require, without being haled into court to have federal judges second-guess its decision.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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